No. 98-8770-CSY Title: James Michael Flippo, Petitioner
v.
West Virginia

Docketed: April 1, 1999 Court: Circuit Court of West Virginia, Fayette County

Entry	Date	Proceedings and Orders
	Mar 31 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 21, 1999)
	May 19 1999	DISTRIBUTED. June 3, 1999
	May 21 1999	Response requested. (Due June 21, 1999 - NONE RECEIVED)
	Jun 10 1999	Order extending time to file response to petition until July 21, 1999.
	Jul 21 1999	Brief of respondent West Virginia in opposition filed.
	Jul 26 1999	Reply brief of petitioner James Michael Flippo filed.
	Aug 5 1999	REDISTRIBUTED. September 27, 1999
	Oct 4 1999	REDISTRIBUTED. October 8, 1999
	Oct 12 1999	REDISTRIBUTED. October 15, 1999
	Oct 18 1999	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached opinion.)
		**********
	Nov 17 1999	MANDATE ISSUED.

98-8770 (2)

Supreme Court, U.S.
FILED
MAR 31 1999
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No.

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Ira Mickenberg

March 30, 1999

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QUESTION PRESENTED

Whether the state court erred by explicitly refusing to obey Mincey v. Arizona, and instead announcing a new rule of law establishing in West Virginia a "crime scene exception" to the warrant requirement of the Fourth Amendment, that permits police to search "anything and everything" at a crime scene without a warrant.

OPINIONS BELOW

1. The Order of the Kanawha County Circuit Court, denying Petitioner's motion to suppress is reproduced and attached as Appendix A.

2. The Order of the West Virginia Supreme Court of Appeals is reproduced and attached as Appendix B.

JURISDICTION

The final judgment and order of the West Virginia Supreme Court of Appeals was entered on January 13, 1999. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

Introduction

The courts of West Virginia have declared that they will no longer follow Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In its place, they have announced a blanket exception to the warrant requirement that permits the police to search "anything and everything" at the scene of a crime -- without a warrant, and without particularized probable cause.

Immediately after the police removed Reverend James Flippo from the cabin where his wife had been killed, they secured the premises and made sure no other persons were present. Several hours later, without seeking or obtaining a warrant, officers seized Mr. Flippo's closed briefcase from inside the cabin. They opened the briefcase and removed a closed envelope. They opened the envelope and seized several damaging photographs, which were introduced at Mr. Flippo's trial.

Defense counsel made a motion to suppress the photographs as the product of an unlawful warrantless search. Counsel submitted a memorandum of law, explicitly relying on the authority of Mincey v. Arizona. The trial court denied the motion to suppress by establishing a crime scene exception to the warrant requirement:

> the investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area.

Order of May 28, 1997, page 3.

This ruling is a direct violation of unambiguous, well-established constitutional law. The Supreme Court of Appeals of West Virginia has allowed the ruling to stand.

People convicted of crimes in West Virginia -- even people like James Flippo, who are sentenced to life without possibility of parole -- do not have an appeal of right. There is no intermediate appellate court, and the West Virginia Supreme Court of Appeals need not hear any case. James Flippo was convicted by a court that brazenly announced its refusal to follow accepted constitutional principles. The State Supreme Court knew this, turned its back on the law, and refused to even consider the case.

The Illegal Search and Seizure

The State's evidence against Reverend James Michael Flippo was purely circumstantial. There was no eyewitness identification. There were no confessions; no DNA tests; and no incriminating serology or fingerprint analysis.

The known facts were largely undisputed. Everyone agreed that on the night of April 30, 1996, Rev. Flippo and his wife, Cheryl, vacationed at a cabin in Babcock State Park, in Fayette County, West Virginia. Everyone also agreed that sometime around 2:30 in the morning, Rev. Flippo ran out of the cabin into a heavy rainstorm wearing only his underwear, and called 911 to report that he and his wife had been attacked. T. 550-552.[1] When the authorities arrived a few minutes later, they found Rev. Flippo waiting for them, obviously distraught, with bruises on the front and back of his head, and cuts and scratches on his legs. T. 526, H.23-24. His wife was

[1]References to page numbers in the trial transcript will be cited as T. #. References to page numbers in the transcript of the hearing on the motion to suppress physical evidence will be cited as H. #.

lying inside the cabin with severe head wounds, beaten to death.

Rev. Flippo told police that he was awakened by an intruder in the middle of the night; that the intruder knocked him out, and must have killed Mrs. Flippo while the Reverend was unconscious. T. 853-856.

When the police responded to Rev. Flippo's 911 call, they believed that he was the victim of a crime. T. 847. They did not then consider him a suspect, and did not take him into custody. H. 25, 36. The police did, however, take him to a hospital for treatment, and then to a police station for questioning. H. 19-32. After the police took Rev. Flippo to the hospital, officers searched his cabin. H. 130-131. The officers were not looking for any particular piece of evidence, and had no idea if the dozens of items they seized had any evidentiary value. The officers made no attempt to obtain a warrant.

Several hours after they secured the crime scene, police officers seized Rev. Flippo's closed briefcase, which was lying on a table inside the cabin. H. 135-136, 149. They opened and searched the briefcase without seeking or obtaining a warrant, and seized a closed envelope. They opened the envelope, also without seeking or obtaining a warrant, and seized several photographs. The police admitted that at the time of the seizures they had no warrant, and no idea of whether the photos, envelope, or briefcase were evidence of anything. See H.132. The pictures were later introduced at trial. T. 1087-1109.

Defense counsel moved to suppress the photographs, on the grounds that the police did not obtain a warrant, and there was no exception to the warrant requirement that could justify the search and seizure. Counsel also filed a memorandum of law in support of the motion, directing the trial court's attention to Mincey v. Arizona, in which this Court held that there can be no

"crime scene exception" to the warrant requirement of the Fourth Amendment. 475 U.S. at 395, 98 S.Ct. 2415.

The trial court denied the motion, ruling that when the police secure the premises of a crime scene, they may search "anything and everything" in the area without a warrant. Order of May 28, 1997, page 3.

The Trial

The photographs seized from James Flippo's briefcase were pictures of a partially nude man named Joel Boggess, a friend and congregant of Rev. Flippo.

Prior to trial, defense counsel learned of rumors that Rev. Flippo had a homosexual relationship with Joel Boggess. Both men vehemently denied this. T. 1553-1554. There was never any proof of these rumors, and the State never claimed that homosexuality had anything to do with Mrs. Flippo's death. Nonetheless, in an excess of caution, defense counsel made a pre-trial motion to preclude the State from mentioning anything about accusations of homosexuality. The motion was granted. Order of July 15, 1997, ¶3-5.

Despite the pre-trial ruling, the State repeatedly insinuated to the jury that Rev. Flippo was sexually intimate with Joel Boggess. The partially nude photos seized from the briefcase were introduced into evidence in the State's case-in-chief. The State also introduced evidence that Rev. Flippo and Mr. Boggess had once gone on a ski trip together, and had shared a motel room with only one bed . T.1581-6. Other State's witnesses testified about a group dinner that included Rev. Flippo, Mrs. Flippo, Mr. Boggess and two other couples, at which James Flippo and Joel Boggess engaged in silly horseplay in the restaurant, punching each other in the ribs and

shoulders. T.1303-1304

The State never tried to justify this evidence by claiming that homosexuality was relevant to the case. The State did not assert that homosexuality had anything to do with motive, intent, or anything else in the trial. Instead, the prosecutor disingenuously insisted that he was not suggesting anything about homosexuality at all. He said he was merely letting the jury know "that the relationship of these two men was more than just good friends." T. 1581.

When the State offered this excuse, the trial court made a finding of fact that the prosecutor had indeed been suggesting throughout the trial that Rev. Flippo was homosexual. The trial judge characterized the prosecution's innuendo by remarking, "It might show that [homosexuality] if you have a devious mind and think badly about it . . . . you were doing that to show that [Rev. Flippo's behavior with Joel Boggess] was something out of the ordinary. T. 1581. Despite this finding, though, and contrary to the court's pre-trial ruling, the trial judge permitted the State to make these insinuations.

The smarmy tone that dominated Rev. Flippo's trial, and the use to which the State put the illegally seized photographs is encapsulated in the prosecutor's closing argument to the jury:

> I didn't accuse Joel Boggess of being a homosexual. I didn't accuse him of being gay. I didn't accuse Mr. Flippo of being gay or homosexual. I never did that. . . .
>
> But I submit to you that most people in our society would think it's unusual . . . for a minister or pastor of a church to sleep with people in his church that he's not married to. . . .
>
> Pastor Flippo is spending nights sleeping with Joel Boggess, am I wrong to think that's improper? . . .
>
> I don't know what happened in that bed. . . .

> And I don't know exactly what the extent of the relationship was between Mr. Flippo and Mr. Boggess, but it appeared to be very close, very intimate.

T. 1880-1882.

The illegally seized photos provided a graphic visual representation of the State's extraordinarily improper closing argument.

In this fashion, the State used photographs seized through a blatant violation of the Fourth and Fourteenth Amendments to spread innuendo so prejudicial as to create additional violations of the Fifth, Sixth and Fourteenth Amendments, and thereby deprive James Flippo of a constitutionally fair trial.

REASONS FOR GRANTING THE WRIT

POINT ONE: THE STATE OF WEST VIRGINIA CANNOT REFUSE TO FOLLOW MINCEY v. ARIZONA. THE STATE COURT IN THIS CASE FLOUTED MINCEY BY ANNOUNCING A "CRIME SCENE EXCEPTION" TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT. IT THEN USED THAT UNCONSTITUTIONAL "EXCEPTION" AS THE ONLY BASIS FOR DENYING PETITIONER'S MOTION TO SUPPRESS.

Flippo v. West Virginia is one of those rare cases in which a state court openly and explicitly declares that it will not obey the United States Constitution and the rulings of this Court. When presented with controlling United States Supreme Court precedent, the West Virginia court simply announced a new rule of law -- one that has been squarely rejected by this Court, and held to violate the Fourth and Fourteenth Amendments.

In 1978, this Court held that a crime scene exception to the warrant requirement "is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of [an] apartment was not constitutionally permissible simply because a homicide had recently occurred there." Mincey v. Arizona, 437 U.S. at 395, 98 S.Ct. at 2415. During the past twenty years, this court has repeatedly confirmed the constitutional necessity of Mincey. Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S.Ct. 2130, 2135, 124 L.Ed.2d 334 (1993); California v. Acevedo, 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); Horton v. California, 496 U.S. 128, 133 n.4, 110 SA.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 1289 (1990).

Despite this Court's clear direction over the last two decades, that there can be no constitutional "crime scene exception" to the warrant requirement, West Virginia has declared that within its boundaries, such an exception exists. According to the state court, in West Virginia, "anything and everything" at a crime scene may be searched and seized without a warrant. This unconstitutional rule was the court's sole basis for denying Petitioner's motion to suppress.

No other exception to the warrant requirement justified denying Petitioner's motion. This was not a search incident to arrest, because petitioner was not arrested until several days after the search. It was not a plain view seizure, because even the police officers admitted that the seized photos were not in plain view. To the contrary, they were hidden in a closed envelope inside a closed briefcase.

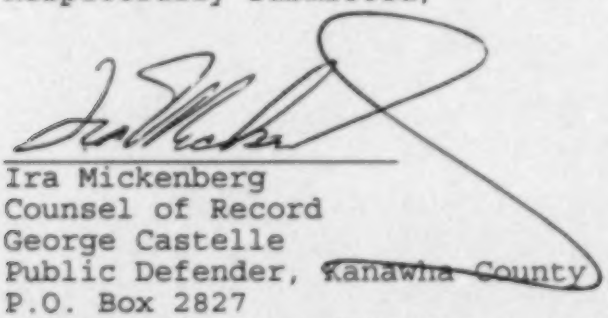
There were no exigent circumstances, because the police had secured the premises hours before they searched the briefcase and envelope. There was no possible danger that evidence would be destroyed or removed. It was not an inventory search, because the police admitted that they were searching for evidence, and never claimed to be following an inventory policy.

The sole issue in this case is whether the courts of West Virginia are required to obey the United States Constitution and the precedents established by the United States Supreme Court. The state court has announced that it will not do so. Certiorari should be granted to confirm that they must.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A: Opinion of the Circuit Court of Kanawha County, West Virginia, Denying Petitioner's Motion to Suppress Physical Evidence

IN THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

vs. **INDICTMENT NO. 96-F-119**

JAMES MICHAEL FLIPPO

ORDER

On an earlier day, the Defendant filed various written motions in regard to the above-referenced felony indictment, and on January 22, 1997 a hearing was held incident to the Defendant's motions seeking a change of venue and to suppress any statements made by the Defendant to the investigating officers on the night and morning of the homicide in question, photographs and negatives taken by an investigating officer from a briefcase found at the crime scene, evidence obtained from the Defendant's body, photos taken of the Defendant's body, both pursuant to a Kanawha County Magistrate Court search warrant, certain documents given to investigating officers by a sister of the victim, and a statement made by the Defendant while being transported to confinement after a magistrate court appearance.

The evidence is abundantly clear that the investigating officers, from the time of the Defendant's early morning 911 call until approximately 10:06 a.m. on the morning of April 30, 1996, considered the Defendant to be a crime victim, not a suspect. The evidence is also abundantly clear that, during the aforementioned period of time, the Defendant was neither in custody, under arrest, nor suspected of any crimes, and was treated with care, politeness and professionalism by the investigating officers who were investigating an obvious homicide of the Defendant's wife, with the Defendant being considered, at that time, also a victim. At approximately 10:30 a.m. on the aforementioned morning, the investigating officers

ENTERED May 28, 1997
Crim. BK. 77 PGE. 122

apparently concluded, based on all that their investigation had, to that point disclosed, that they should consider the Defendant a suspect, and the Defendant was then advised by an investigating officer of his constitutional rights commonly referred to as the Miranda warnings, but he was neither charged, taken into custody nor arrested at that time. From that time, until approximately 2:00 p.m. on the same day, the Defendant waited, neither arrested nor charged with any crime, in the Fayette County Sheriff Department's offices for his lawyer to arrive. The Defendant's lawyer did arrive near 2:00 p.m.

At the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives.

Because the state medical examiner, who had performed or was performing an autopsy on the victim, wished to observe the Defendant's injuries, a search warrant was obtained in Kanawha County, West Virginia, where the Defendant lived, for the purpose of obtaining blood samples from the Defendant, having photographs of the Defendant's injuries taken by the medical examiner's staff, having the medical examiner observe the Defendant's injuries and body, and having fingerprints and footprints taken by State Police officials. The evidence is abundantly clear that all of the aforementioned matters were lawfully obtained pursuant to the aforementioned search warrant, with the Defendant's lawyer being present.

Some days after the Defendant had been charged with his wife's murder, arrested and incarcerated, he apparently made some comments in a police vehicle while being transported by a Fayette County Corrections Officer to the Southern Regional Jail. The comments were made in the presence of other prisoners and the Corrections Officer. There is no evidence at all that the Corrections Officer did anything to solicit or encourage the Defendant's making any such statements. Said Corrections Officer, at the request of an investigating officer, wrote down the jist of what he remembered the Defendant saying.

Several days after the homicide, the victim's sister gave an investigating officer some notebooks and journals which she had apparently obtained from the home of the Defendant and the victim. The evidence is abundantly clear that the victim's sister brought this material to the investigating officer without the investigating officer having ever talked to her or requesting that she bring such material to him. The evidence is clear that the victim's sister was acting as a sister, not as an agent for the State.

The Court concludes that the investigating officers did not violate any of the Defendant's constitutional rights when they obtained any of the aforementioned statements from the Defendant. The statements were wholly voluntary, and obtained while the Defendant was clearly considered a crime victim, not a suspect. The evidence is clear that after the Defendant was properly advised of his constitutional rights and then invoked his right to counsel, the investigating officers obtained no further statements from the Defendant. The statement made by the Defendant while being transported to jail, was purely a voluntary statement made by the Defendant, and simply overheard by the Corrections Officer, who in no way solicited the Defendant to say anything.

The evidence is also quite clear that the aforementioned search warrant obtained by the investigating officers, and the evidence seized therewith, are not, in any manner, constitutionally infirm.

The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine.

The Court further concludes that the documents brought to the investigating officers by the victim's sister were brought by the victim's sister of her own volition, not at the request of any investigating officer, and not in any capacity as an agent or quasi agent of the investigating officers.

Accordingly, based on all of the aforementioned, the contents of the court file, the transcript of the January 22, 1997 aforementioned hearing, and the written memoranda of law by all counsel, the Court concludes that the Defendant's motion to suppress all of the aforementioned matters is not well founded.

Accordingly, it is **ORDERED** that the Defendant's aforementioned motion to suppress be and the same is hereby denied.

Also, the Defendant, on January 22, 1997, offered evidence in support of his motion seeking a change of venue for the trial of the above-styled criminal case, and, on a later day, the State offered evidence, via in court testimony of a variety of adult, Fayette County citizens, from each of the three (3) magisterial districts of the county, in opposition to the aforementioned motion.

The Court, after due consideration of all of the evidence presented by the Defendant and the State and the written memoranda of law of all counsel, is of the opinion that the Defendant has failed to show good cause in support of his motion for change of venue. Further, the Court finds that the Defendant has fallen short of his burden of proving that, at the time of his motion for change of venue, a present hostile sentiment against the Defendant existed throughout all of Fayette County, which would deny the Defendant his right to a public jury trial by an impartial jury of Fayette County adults.

Accordingly, it is **ORDERED** that the Defendant's motion for change of venue be and the same is hereby denied.

It is further **ORDERED** that the trial of this case shall commence on Tuesday, July 15, 1997 at 9:00 a.m.

It is additionally **ORDERED** that all pretrial issues, both State and defense, shall be resolved prior to the morning of trial.

The Clerk shall mail an attested copy of this Order to Paul M. Blake, Jr., Fayette County Prosecuting Attorney, and David Schles, Attorney at Law, P. O. Box 786, Charleston, West Virginia 25323, counsel for the Defendant.

ENTERED this the 28th day of May, 1997.

5-28-97
cc: P/D
DS
PMB
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JOHN W. HATCHER, JR.
JUDGE

APPENDIX B: Order of the Supreme Court of Appeals of the State of West Virginia Refusing to Allow Petitioner to Appeal the Denial of His Motion to Suppress or Any Other Aspect of His Conviction.

JAN 28 1999
PUBLIC DEFENDER OFFICE

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of January, 1999, the following order was made and entered:

State of West Virginia, Plaintiff
Below, Respondent

vs.) No. 982196

James Michael Flippo, Defendant
Below, Petitioner

On a former day, to-wit, August 11, 1998, came the petitioner, James Michael Flippo, by Ira Mickenberg and Gregory L. Ayers, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Fayette County, rendered on the 30th day of April, 1998, with the record accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: Deborah L. McHenry
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No.

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Ira Mickenberg, a member of the Bar of this Court, hereby certify that on this 29th day of March 1999, a copy of the Petition for a Writ of Certiorari, and a copy of the Motion to Proceed in Forma Pauperis in this Court were mailed, first class postage prepaid, to Paul M. Blake, Jr., Prosecuting Attorney, for Fayette County, counsel for the respondent herein. I further certify that all parties required to be served have been served.

Ira Mickenberg, of counsel
Kanawha County Public Defender
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(304) 558-2323
Counsel for Petitioner

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
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JUL 21 1999
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No. 98-8770

IN THE
SUPREME COURT OF THE UNITED STATES
March Term, 1999

JAMES M. FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for Certiorari to the
Supreme Court of Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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32 pp

QUESTION PRESENTED

Whether consent to a warrantless search of an unlocked briefcase may be implied where the owner of the briefcase had summoned the authorities seeking their help, had reported that an unknown masked assailant entered his rented cabin and killed his wife in the course of a probable robbery, had directed authorities to the cabin where the body and briefcase were found in close proximity and had cooperated in their investigation, but who had not expressly consented to any search and who was not present when the briefcase was opened.

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No. 98-8770

IN THE
SUPREME COURT OF THE UNITED STATES
March Term, 1999

JAMES M. FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The State of West Virginia, by its Attorney General, respectfully suggests that there is no fundamental conflict between the decision below and Mincey v. Arizona, 437 U.S. 385 (1978), and that the Petition for Certiorari should therefore be denied. Unlike Mincey, the facts below strongly suggest that petitioner impliedly consented to the search he complains of here, though no court has yet expressly so ruled. In addition, the photographs thereby obtained (attached hereto) were not inflammatory, were cumulative of other unchallenged evidence on the same issue of fact, and were consequently harmless beyond a reasonable doubt. Either rationale, neither of which conflicts with Mincey, could be the basis of the result below.

I.

STATEMENT OF THE CASE

At 2:11 a.m. on Tuesday morning, April 30, 1996, the Fayette County 911 operator received a call from a pay phone at Babcock State Park (hereafter "Babcock"), an isolated, rustic, park in rural Fayette County, West Virginia. The caller, Reverend Flippo (petitioner herein), reported that he and his wife had been awakened and beaten in their rented guest-cabin by an intruder, that his wife was severely injured, that he was also injured, and that he needed help.[1] Unfortunately, due to Babcock's remote

---

[1]Excerpts from a transcript of the recorded call demonstrate why Reverend Flippo was regarded by the local Sheriff's Office as a victim seeking assistance:

> 911 OPERATOR: May I help you?
> CALLER: I need help bad.
> 911 OPERATOR: What's wrong?
> CALLER: I'm hurt bad and wife's hurt bad.
> 911 OPERATOR: Did you wreck?
> CALLER: No. I'm in my cabin and somebody hurt me.
> 911 OPERATOR: Somebody hurt you in your cabin?
> CALLER: Yes. And my wife won't wake up and I don't know what to do.
>
> • • •
>
> 911 OPERATOR: I need to know exactly how did you get hurt, honey? I need you to calm down and tell me this.
> CALLER: He hit me with a log.
>
> • • •
>
> CALLER: I think they cut me, too.
>
> • • •
>
> CALLER: I woke up -- no. I woke up, and my wife wouldn't wake up. They hit her, too.
>
> • • •
>
> 911 OPERATOR: We're dispatching the police and I've got an ambulance enroute. Okay?
> CALLER: Okay. I'll watch for them.
>
> • • •
>
> 911 OPERATOR: . . . Okay. Where is your wife at? Do you know exactly where she's at?
> MR. FLIPPO: She's at my cabin.

(continued...)

location, it took 20 to 25 minutes for the first law enforcement officer, a Deputy Sheriff, to arrive and even longer for the ambulance. (T. 549, 561.)[2] Reverend Flippo told the 911 Operator, and soon after told deputies, the details of an assault and apparent robbery just visited upon he and his wife while sleeping at the remote cabin.

Flippo said he awoke to discover a masked man crouched near their bed. He tried to awaken his wife to run, but the intruder hit him with a fire log, knocking him unconscious. When he regained consciousness, the masked man was cutting on his thighs with a knife and threatening to castrate him. The intruder again knocked Flippo

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[1](...continued)
911 OPERATOR: Okay. What cabin are you in? Do you know?
MR. FLIPPO: 13. 13. I'm at the -- I'm at the office. I'm at the office.
911 OPERATOR: Okay. You're at the office. But is your wife in Cabin 13?
MR. FLIPPO: Yes.

• • •

MR. FLIPPO: Is somebody coming? Is somebody coming?
911 OPERATOR: Yes, honey, they're coming.

• • •

MR. FLIPPO: Is somebody coming to help me?
911 OPERATOR: Yes, honey. I've got -- I've got two ambulances coming and I've got a police officer coming. Okay?
MR. FLIPPO: Okay.

• • •

911 OPERATOR: Okay. What about the guys that hit you? Have they already left?
MR. FLIPPO: I never saw them.
911 OPERATOR: You never saw them?
MR. FLIPPO: Somebody hit me with a log.

• • •

MR. FLIPPO: I think I saw a knife.
911 OPERATOR: You saw a knife?
MR. FLIPPO: I saw a knife somewhere. I don't have a knife, but I saw a knife somewhere.

(T. 520; State's Exh. 56.)

[2]References to pages of the trial transcript are preceded by a "T.," to the suppression hearing transcript by "S.H." and to other documents of record by "R."

out. Upon awakening, Flippo found his unconscious wife on the floor, her head covered with blood. Being unable to locate his cell phone or his Cadillac, Reverend Flippo ran in his bloodied undershorts to the pay phone outside the park office. (State's Exhs. 1, 56.)

Reverend Flippo related the aforesaid facts to Deputy Bryant (the first officer to arrive), and directed him to the cabin. (T. 553-54.) Deputy Bryant used his radio to alert other officers to keep an eye out for Flippo's missing green Cadillac. (Id.) An unknown red Camaro convertible was inexplicably parked at the cabin, suggesting that the intruder, or others, might be inside or nearby. (T. 564.) Leaving Flippo in his patrol car, Deputy Bryant descended the steps to the cabin, cautiously examined it from outside, and then entered through the already open front door. He found Mrs. Flippo's body adjacent to the bed on the floor of the main room.[3] (T. 558-561.) As Deputy Bryant returned to his vehicle, he encountered Flippo descending the stairs, asking, "Did she wake up?" The Deputy responded, "No," and took Mr. Flippo back to the cruiser as paramedics arrived on the scene. (T. 561.)

Using his radio, Deputy Bryant had another cruiser seal off the lane heading to the cabin, and dispatched the park superintendent and his assistant to "check the other cabins in the area, to see if any forceful entry had been made, and to check on the health and welfare of any other guests that might be around." (T. 563.) Deputy

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[3]The main room of the cabin included the bed, the table on which the briefcase lay, chairs, and a fireplace.

Bryant had the paramedics check Mr. Flippo's condition and take him to the hospital for examination of his injuries. (Id.)

Sheriff's Detective Kessler proceeded to the hospital in Oak Hill (approximately 25 minutes from the crime scene) to interview Reverend Flippo, while Detective Burke went directly to Babcock to "process the crime scene." (S.H. 20, 130.) The deputy who customarily took photographs divided his time, going first to the hospital to photograph the Reverend's injuries, and then proceeding to the cabin to take a photographic inventory of the undisturbed crime scene. (S.H. 129-130.) Detective Burke took control of the investigation at the cabin, first searching the perimeter for signs of footprints or a forced entry (finding none) and, after the photographer arrived, entering the cabin at 5:32 a.m. (S.H. 130, 146.)

Once inside, Detective Burke supervised the photography of the scene and participated in the collection of blood swabs, fingerprints, splattered brain-matter and other evidence in plain view (including a bloody fire-log, kitchen-knife, bloodied bed-clothes, etc.). This process continued until 9:43 p.m., at which time the cabin was locked and returned to the control of Babcock State Park.

The numerous crime-scene photographs taken that day included a closed briefcase on a picnic-style table just inside the door of the main room and a later photograph of the open briefcase and its contents. (T. 933, 1022.) The record does not reveal when the briefcase was opened. All items of evidentiary value, and all property of the Flippo's (including the briefcase and its contents) were taken to the Sheriff's Office "for security." (T. 755, 1218.) A "Property Receipt" contained an

inventory of all items seized, whether as evidence or for safe-keeping. (T. 1023, 1217-18; State's Exh. No. 7.)

At trial, Detective Burke indicated that he "inventoried the briefcase." (T. 1023.) At the pre-trial suppression hearing, he testified that the briefcase contained a film processing envelope indicating that the enclosed photos had been processed for Reverend Flippo the preceding day (April 29th) and that he consequently "seized the complete briefcase and these photos in particular because of, Number 1, it depicts photos of a person who was unknown to us at that time, and we wanted to identify the person in the photos because we were investigating a homicide and was looking for potential witnesses." (S.H. 132.)

While Detective Burke was processing the crime scene, Detective Kessler was interviewing Flippo, first at the hospital, and then at the Sheriff's Office. Though Flippo remained cooperative throughout, internal inconsistencies in his assertions prompted Detective Kessler to suggest to Reverend Flippo, at 10:06 a.m., that the discrepancies were sufficient to make him a suspect and he was informed of his Miranda rights. When asked if he would submit to a voice stress analysis test, Reverend Flippo requested an attorney and no further interviewing took place. (S.H. 45.) However, he was still not placed in custody or under arrest, and left with his attorney at approximately 2:00 p.m. (S.H. 47-50.) The trial court found that Reverend Flippo was not a suspect until, at the earliest, 10:06 a.m. (Petitioner's Appendix A at pp. 1-2.) At a pretrial evidentiary suppression hearing, defense counsel sought to suppress all information obtained from Reverend Flippo during Detective

Kessler's non-custodial interviews, and to suppress the photographs of Joel Boggess found inside the briefcase. The motion was denied. (Petitioner's Appendix A.)

The State's case at trial lasted over a week, and consisted of 27 witnesses and over 100 exhibits, including ten photographs found in the briefcase.[4] It was a circumstantial case built largely upon inconsistencies between Reverend Flippo's statements and the physical evidence. For instance, the "unknown" red Camaro found outside the cabin actually belonged to Joel Boggess, who explained that he had exchanged cars with Reverend Flippo the day before the homicide. (T. 1539-1542.) Indeed, Reverend Flippo's "missing" Cadillac was in Boggess's driveway on the morning of the homicide, and remnants of the "missing" cell-phone were found in the cabin's fireplace. (T. 690.) No sign of forced entry was found at the cabin, nor any unexplained fingerprints or footprints either outside or inside the cabin (it was raining at the time). Perhaps the most damaging evidence was the testimony of a forensic pathologist that the minor injuries suffered by Flippo during the alleged attack appeared to be self-inflicted. (T. 1617.)

Though Flippo did not testify at trial, some of the exculpatory assertions in his investigatory interviews were "impeached" by State's witnesses. Flippo's explanation to the police that he had left the door unlocked was attacked by the victim's sister, who testified that Mrs. Flippo was very concerned about security and always locked doors. (T. 1386.) Contrary to Flippo's statement to an acquaintance that the decision

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[4]Photocopies of the admitted photographs are appended hereto. No other items taken from the cabin were the subject of a suppression motion.

to spend the night at Babcock was spontaneous (T. 1383-1384), he had actually made a reservation two days before, specifically requesting an "isolated" cabin. (T. 461-469, 485.) His comments that he had never before been to Babcock (Tr. 472, 481) were contradicted by Boggess, who testified they had been there at least twice before, the last time being the same day that Flippo reserved cabin 13 after Boggess had shown it to him. (T. 461-469, 485, 1523-1529.)

Evidence of possible motives was also introduced. Witnesses testified that Reverend Flippo was a compulsive spender and consequently his wife had limited his access to the family's income and bank accounts. (T. 1324, 1366.) They had an $80,000 account that required both of their signatures for any withdrawals. (T. 1330.) In addition, the Flippo's had recently obtained a life insurance policy on Mrs. Flippo in the amount of $100,000 naming her husband as the beneficiary. (T. 798.) Five days after his arrest, Flippo commented to a correctional officer that he was financially "better off" following his wife's death "than he had ever been." (T. 1339.)

There was testimony from three witnesses that Mrs. Flippo was displeased with her husband's relationship with Joel Boggess. (T. 823, 1298-99, 1325.) One such witness testified that Flippo said that his wife knew he was "sick of her" and "would leave her" if she interfered with Flippo's intention to purchase land jointly with Mr. Boggess. (T. 1324.) A letter from Flippo to his wife, found at the scene, complained bitterly of her attitude towards Boggess. (State's Exh. 10.) Joel Boggess testified for the State as a hostile witness, denying that his friendship with the Reverend had caused any friction with Mrs. Flippo, whom he had considered a good friend. Boggess

claimed that some of the pictures of him found in the briefcase were taken without his knowledge following his private baptism by Reverend Flippo in a creek at Babcock two days prior to the killing. (T. 1527.) He testified that he and the Reverend had taken other trips together during which they had shared the same bed, but that there was no sexual relationship. (T. 1553.)

About a month prior to the homicide Reverend Flippo began reporting to police that a "stalker" was making strange phone calls and sending threatening notes, including one that Reverend Flippo found on his refrigerator following a reported "break-in" of his parsonage. (T. 1265-1270.) Flippo was unable to name a suspect, however, and the "break-in" looked staged to the officer who investigated it. (T. 1266.)

After finding him guilty of first degree murder, the jury received additional evidence related solely to sentencing to determine whether the Defendant should receive "mercy," making him eligible for parole after serving 15 years of his life sentence. The additional evidence established that Reverend Flippo had improperly placed Boggess on his church's health insurance policy (T. 1964-65), had taken more than $15,000 from a fund created for the benefit of a child needing a liver transplant, (T. 1953-54) and had apparently diverted other church funds as well. (T. 1961-63.) The jury declined to grant mercy, so Flippo was sentenced to life in prison with no possibility of parole.

II.

REASONS FOR DENYING THE WRIT

A. West Virginia Follows *Mincey v. Arizona*.

In Mincey v. Arizona, 437 U.S. 385 (1978), a narcotics raid on petitioner's apartment resulted in an exchange of gunfire inside the apartment, severely wounding Mincey and killing an undercover officer. Shortly thereafter, homicide detectives conducted an exhaustive four-day warrantless search of the apartment, opening dresser drawers, ripping up carpets, and seizing 200 to 300 objects, which were used at trial to convict Mincey of murder and narcotics offenses. The Arizona Supreme Court held that the search was permissible under a "murder scene exception" recognized in its earlier rulings. This Court reversed:

> In sum, we hold that the "murder scene exception" created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.

437 U.S. at 395. This Court remanded the case to the Arizona Supreme Court to determine to what extent exigent circumstances could justify any of the items seized. 437 U.S. at 395 n.9.

Unlike Arizona and several other states, West Virginia has never recognized a "murder scene exception." It has always followed federal precedent requiring that nonconsensual searches of residences, including motel rooms, be based upon warrants issued upon probable cause, "'subject only to a few well-delineated exceptions'." State v. Buzzard, 194 W. Va. 544, 549, 461 S.E.2d 50, 55 (1995), quoting and

following Katz v. United States, 389 U.S. 347, 357 (1967). Indeed, in State v. Cook, 175 W. Va. 185, 332 S.E.2d 147 (1985), Mincey was specifically relied upon in reversing a murder conviction tainted by incriminating evidence found in the suspect's motel room:

> [T]he instant case bears resemblance to the circumstances involved in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), where arresting officers secured the scene of a homicide until detectives arrived ten minutes later to conduct a search that lasted four days. The Court, refusing to recognize a "murder scene exception" to the fourth amendment, stated that:
>
> > There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.
>
> 437 U.S. at 394, 98 S. Ct. at 2414, 57 L. Ed. 2d at 301. Similarly, in the present case, there was no excuse for the failure to obtain a warrant prior to the search of the motel room by the second group of officers after the premises had been secured.

175 W. Va. at 193, 332 S.E.2d at 155.[5] Thus, contrary to Petitioner's claims, West Virginia is not a renegade State that chooses to ignore Mincey.

In this case, most of the testimony and argument on Defendant's Motion to Suppress was oriented towards establishing the earliest point at which the police regarded Reverend Flippo as a suspect rather than a victim. This was important to

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[5] See also State v. McNeal, 162 W. Va. 550, 251 S.E.2d 484 (1978), reversing a conviction in which "five police officers descended upon a private residence, kicked the door down, entered and seized the defendant . . . , searched the house and seized a paring knife, ..." 162 W. Va. at 556, 251 S.E.2d at 488. The court relied upon the recently decided Mincey for the proposition that "the police must obtain an arrest warrant before entering a home to seize a person." Id.

Flippo's efforts to suppress the interviews conducted by Detective Kessler, which were not preceded by Miranda warnings. All officers testified that Reverend Flippo was regarded solely as a cooperative victim for many hours after the crime occurred, as recited in the trial court's order.[6] This evidence was also tangentially relevant to the Fourth Amendment issue, as the police perception that Flippo was an injured victim was undoubtedly a factor in their failure to obtain a warrant to search the cabin. "One can hardly expect the police to get a search warrant for a house or building when the owner is obviously cooperative and gives every appearance of being the victim, rather than the perpetrator, of a crime." Steigler v. State, 277 A.2d 662, 667 (Del. 1971).

In their briefs to the trial court, both the prosecutor and defense counsel relied on Mincey v. Arizona, the State citing it for its dicta that police may "conduct an immediate investigation [of a crime scene] to preserve evidence from intentional or accidental destruction." (R. 56.) (Unlike the situation in Mincey, where the perpetrator was known and hospitalized, Flippo's assailant remained at large and was presumably fleeing and hiding his tracks.) The State's brief also relied on the "plain view" doctrine (pointing out that the briefcase was unlocked) and characterized the police activity at the scene as a "crime scene search and inventory." (R. 57.)

Although "consent" was not argued, the facts recited in the State's brief and the trial court's Order stressed the police-perception that Reverend Flippo was a

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[6]See Petitioner's Appendix A, at pp. 1-2. The Order does not disclose that Flippo left the Fayette County Sheriff's Department at 2:00 p.m. and was neither charged nor arrested until May 3, 1996, three days after the crime occurred. (S.H. 50; R. 40-45.)

cooperating victim.[7] Unlike the State's brief, the trial court's Order makes no mention of exigent circumstances, plain view, or inventory. It is the trial court's terse ruling on the Fourth Amendment issue which Petitioner capitalizes upon in characterizing West Virginia as a renegade State which "explicitly" refuses to follow Mincey v. Arizona:

> The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine.

(Petitioner's Appendix A at p. 3.) Though the quoted statement appears inconsistent with Mincey absent an invocation of plain view, exigent circumstances, or consent, it is certainly not an attempt to "explicitly" overrule a decision of the United States Supreme Court, as Petitioner repeatedly suggests. Rather, it is either an unreasoned conclusory statement or an incomplete disclosure of the trial court's reasoning.[8]

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[7]Detective Kessler obtained a warrant to search Joel Boggess's car while the cabin search was in progress (T. 627-628) and also secured a warrant to allow a forensic pathologist to examine Reverend Flippo's injuries two days later. (T. 64-71.) (It was apparently this examination that led to the decision to charge and arrest Flippo the next day.) Clearly, if the deputies thought Reverend Flippo objected to their search of the cabin, they would have obtained a warrant for the cabin as well as the car.

[8]The trial court's statement that the officers were "within the law" is unexplained, but was presumptively based on established legal principles rather than rebellion against Mincey. Petitioner credibly argues that the State's theories of exigent circumstances, plain view, and inventory each had their own difficulties in light of the testimony at the suppression hearing, but this does not foreclose the possibility that the trial court's ruling was nonetheless premised thereon.

Reverend Flippo's Petition for Appeal was "refused" by the West Virginia Supreme Court of Appeals, meaning that it declined to exercise appellate jurisdiction. In West Virginia, as in Virginia, "there is no appeal as of right from a criminal conviction." Jackson v. Virginia, 443 U.S. 307, 311 n.4. (1979). Such a refusal is not a decision on the merits and does not preclude full consideration of all constitutional issues raised in any State post-conviction proceeding. Smith v. Hedrick, 181 W. Va. 394, 382 S.E.2d 588 (1989). However, the court heard an oral presentation of the petition and had the entire record before it.

Under West Virginia law, a "lower court's judgment may be affirmed when it appears that such judgment is correct on any legal ground disclosed by the record, *regardless of the ground, reason or theory assigned by the lower court as the basis for the judgment*." Syl. pt. 3, Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965) (emphasis supplied). Consequently, the refusal to accept Flippo's appeal could be based on a determination that the pictures were harmless-error, or that the search was justified by legal principles not articulated in the trial court's ruling, including consent. Consequently, neither the decision of the circuit court nor of the West Virginia Supreme Court can be construed as a "declaration that West Virginia will no longer follow Mincey v. Arizona, 437 U.S. 385 (1978)." (Petition at p. 4.)

B. The Decision Below Is Not Inconsistent With *Mincey v. Arizona*.

The most obvious fact distinguishing this case from Mincey is that it was the Defendant, Reverend Flippo, who summoned authorities to aid him, and who directed them to the scene of the homicide. Moreover, by claiming that his wife was killed by a third party, that he was injured in the same attack, that his car and cell-phone were missing, and that he had been the subject of stalking threats, he was clearly inviting the police to use all means at their disposal to identify and apprehend the unknown perpetrator. In such circumstances, police could not be expected to obtain a warrant to conduct an investigation at the complainant's dwelling or to open a briefcase to determine if it had been ransacked in the apparent robbery, or contained items with the intruders' fingerprints or items disclosing a possible motive for the assault.

In numerous state court decisions, similar circumstances have been held to constitute an implied consent to the search of the defendant's dwelling and its contents for all purposes associated with investigating the reported homicide. Typical of these is Brown v. State of Texas, 856 S.W.2d 177 (Tex. Crim. App. 1993), which is highly analogous to this case in many respects, particularly in that a closed container was searched without defendant's knowledge. As in this case, "appellant called the police . . . with news that he had just found his wife dead in the garage."

> Appellant asked the police dispatcher to send a squad car and an ambulance to the crime scene which also was his home. He also volunteered the opinion that someone had robbed his wife because her purse was missing. Appellant appeared very upset, and an officer soon escorted him to a patrol unit to calm down and stay warm until the

> investigators could speak with him. Appellant proceeded to discuss his activities earlier that day.

856 S.W.2d at 179. After securing the premises and searching the outside of the home for clues, a detective entered the house through the garage and noted blood splatters at the entrance of a bedroom. In another bedroom, he found a purse, opened it, and found a cash register receipt which was later used to contradict appellant's assertion that he had remained home all evening. The denial of defendant's motion to suppress the receipt was the subject of an appeal:

> The detective's search of the home was without warrant or the expressed consent of appellant. In fact, no officers ever approached appellant about consent to search. He was in a police car and appeared to be grieving over the death of his wife.

856 S.W.2d at 179. After cataloguing the several state court decisions distinguishing such circumstances from Mincey v. Arizona, the Texas Court of Criminal Appeals joined their ranks as follows:

> We therefore hold that when a crime is reported to the police by an individual who owns or controls the premises to which the police are summoned, and that individual either states or suggests that it was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible.

856 S.W.2d at 182. The Court of Criminal Appeals of Texas relied heavily on State v. Koedatich, 112 N.J. 225, 548 A.2d 939 (1988), quoting it as follows:

> Moreover, courts in other states have found implied voluntary consent where, as in the instant case, the defendant has initiated police contact and has adopted a "cooperative posture in the mistaken belief that he

> could thereby divert or prevent police suspicion of him." *W. LaFave, Search & Seizure; A Treatise on the Fourth Amendment § 8.2(g), at 204 (2d Ed. 1987)*; see also *Steigler v. State*, 277 A.2d 662, 667 (Del. 1971) (actions of fully cooperative defendant amounted to implied consent to search and seizure: "One can hardly expect the police to get a search warrant for a house or building when the owner is obviously cooperative and gives every appearance of being the victim, rather than the perpetrator, of a crime") ; *State v. Fredette*, 411 A.2d 65, 70 (Me. 1979) (defendant initiated police presence through urgent calls to police; invited them to enter home; and continually cooperated with police as they searched home). . . .

856 S.W.2d at 181-82.

Brown notes that this Court, in 1984, clearly implied that circumstances such as those at issue here could support a finding of consent. Thompson v. Louisiana, 469 U.S. 17 (1984). In Thompson, the Louisiana Supreme Court had not addressed consent, instead relying on a general concept of "diminished expectation of privacy" in one's dwelling after a call to authorities for assistance. Though reversing the Louisiana Supreme Court's theory of diminished expectation of privacy, this Court nonetheless remanded for, *inter alia*, a consideration of consent even though "both homicide investigators explicitly testified that they had received no consent to search." 469 U.S. at 23. Since there was no express consent, this Court could only have been referring to implied consent when it said, "[a]ny claim of valid consent in this case would have to be measured against the standards of United States v. Matlock, 415 U.S. 164 (1974), and Schneckloth v. Bustamonte, 412 U.S. 218 (1973)." Id.[9]

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[9]In Thompson, the cause of death and the identity of the perpetrator were known *before* the search was conducted and thus, unlike this case, any implied consent could not be construed to be for those purposes. Post-Thompson decisions in state courts applying the (continued...)

Applying the consent standards of Matlock and Schneckloth, several state appellate courts have, as in Brown v. Texas, supra, found broad consent to search to be implied from a call for assistance accompanied by allegations of an intruder.[10] Though some decisions of lower state courts appear more circumspect regarding the scope and duration of any such implied consent,[11] there is no conflict among the states' highest courts, and the conflicts among lower courts may turn on factual differences.

With respect to Reverend Flippo, there has been no express judicial determination that the record would support a finding of implied consent to search the cabin, and no express judicial determination as to whether the interior of the briefcase was within the scope of such consent. Admittedly, the record does not reveal

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[9](...continued)
"implied consent" theory advocated here are collected and discussed in W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5(e), at 383-385 (3d Ed. 1996).

[10]See State v. Brady, 585 So. 2d 524 (La. 1991) (warrantless search of closet was reasonable after defendant had requested neighbor to call police to report a stabbing, defendant disclaimed any culpability, and manifested interest in officer's investigation); State v. Koedatich, supra; Commonwealth v. Beldotti, 409 Mass. 553, 567 N.E.2d 1219 (1991) (consent implied from defendant's call to the police, telling police where the body was, expression of deep emotional distress at the victim's death, and cooperative attitude); State v. Fleischman, 157 Ariz. 11, 754 P.2d 340, 343-44 (Ariz. App. 1988) (by reporting to the police that his wife had been killed, the defendant gave complied consent to the initial entry and "a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator"); State v. Butler, 676 S.W.2d 809 (Mo. 1984) (injured's husband's call to the police, combined with unlocking the front door just before he died to allow them entry, constituted sufficient consent for police to search the wife's upstairs bedroom, where evidence incriminating her was discovered).

[11]See People v. Annerino, 97 Ill. App. 3d 240, 422 N.E.2d 923 (1981); State v. Jolley, 68 N.C. App. 3d, 314 S.E.2d 134 (1984); People v. Timms, 179 Cal. App. 3d 86, 224 Cal. Rptr. 434 (1986).

whether the briefcase was opened before or after Flippo became a "suspect," a factor likely to be important to the duration of any consent implied from his earlier behavior.

Development of additional facts could occur in a post-conviction habeas corpus proceeding pursuant to W. Va. Code § 53-4A-1, et seq. As previously noted, the State's highest court has held that its refusal of a petition for appeal does not foreclose habeas corpus review of issues raised. Smith v. Hedrick, 181 W. Va. 394, 382 S.E.2d 588 (1989). West Virginia's unusually broad post-conviction statutory remedy has been described by the United States Court of Appeals for the Fourth Circuit as follows:

> This amendment [The Post-Conviction Habeas Corpus Act] provides that West Virginia prisoners may now raise -federal constitutional issues in the state courts, *W. Va. Code § 53-4A-1(a) (1967 amendment)*; and that they must be given a full and fair evidentiary hearing, *W. Va. Code § 53-4A-7(a) (1967 amendment)*. The amendment further provides that the court hearing the matter must make findings of fact, state conclusions of law and the grounds, state or federal, on which resolution of the prisoner's claim is based. *W. Va. Code § 53-4A-7(c) (1967 amendment)*. This 1967 amendment appears to afford adequate postconviction remedies to West Virginia prisoners.

Sheftic v. Bowles, 377 F.2d 423, 426 n.9 (4th Cir. 1967). A post-conviction judgment is appealable to the West Virginia Supreme Court, which may "refuse" the petition for appeal or grant it and consider the case on its merits. W. Va. Code § 53-4A-9. Any such decision would, of course, be subject to certiorari review by this Court.[12]

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[12]The State does not make this suggestion merely to "postpone the inevitable," but rather because useful information would likely be developed at such a hearing. Detective (continued...)

The most significant limitation on Flippo's ability to obtain post-conviction relief in State court is a statutory provision precluding the relitigation of claims which "have been previously and finally adjudicated." W. Va. Code § 53-4A-1(b). Petitioner's Fourth Amendment claim in this case fits the statutory definition and thus would be precluded unless the earlier decision (the circuit court decision at issue here) "upon the merits is clearly wrong." (Id.)

However, the circuit courts of West Virginia must dispose of habeas corpus petitions filed there -- they have no discretion to refuse to exercise jurisdiction -- and must make findings of fact and conclusion of law sufficient to justify any disposition. W. Va. Code § 53-4A-7; Sheftic v. Boles, supra. Consequently, in order to deny relief to Reverend Flippo on the grounds that the Fourth Amendment issue has been "previously and finally adjudicated," the circuit court must necessarily find that the trial court's decision was not "clearly wrong." Otherwise, the issue will have to be determined on its merits after an "omnibus" hearing. Gibson v. Dale, 173 W. Va. 681, 319 S.E.2d 806 (1984). Petitioner would be entitled at such a hearing to counsel and a full evidentiary hearing. Gibson; W. Va. Code §§ 53-4A-4(a) and 53-4A-7(a).

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[12](...continued)
Burke's detailed investigative notes, from which he was cross-examined by defense counsel (T. 1217-18), indicate that Flippo's medicine was retrieved by Burke from the briefcase at noon at the request of Detective Kessler, who was with Flippo at the Sheriff's Office. This information, however, *is not in the record below*. Nor do said notes indicate whether the briefcase had already been opened at that time. All that the current record reveals is that the briefcase remained closed at 5:30 a.m. and was opened before 7:44 p.m., when its contents were photographed.

C. Admission Of The Photographs Was Harmless Error.

Unfortunately, the "consent" theory advocated here was not expressly relied upon below, a factor militating in favor of a grant of certiorari simply to insure that this federal issue is expressly resolved.[13] However, if certiorari were granted, the State would have a strong argument that the admission of the photographs was harmless in any event. The only disputed issue to which they were relevant was the victim's alleged displeasure with Flippo's relationship with Mr. Boggess, which was only one of several circumstances which could have motivated Flippo to kill his wife.[14] However, the relationship with Mr. Boggess, and Mrs. Flippo's negative attitude, were fully developed independently of the photographs by the testimony of three witnesses who had nothing to do with the pictures. (T. 823, 1298-99, 1325.) In addition, a letter written by Flippo to his wife was admitted in evidence, in which Flippo's own words disclosed the motive far better than the pictures he took:

> I wish you would let me be happy, but you won't. You are determined to make me feel sad. You make life miserable over me talking on the phone. I don't understand you.
>
> Why can't I have a friend? Why do you want to own me like a car? Why are you trying to force me to have a friendship with Joel or anyone else in secret? I will not be forced to lie or have a friendship in secret.

---

[13]Stone v. Powell, 428 U.S. 465 (1976), generally precludes federal collateral review of Fourth Amendment issues, thus leaving certiorari as petitioner's sole access to a federal forum.

[14]The pictures also corroborated the appearance of Boggess's red Camaro and the presence of Flippo and Boggess at Babcock the weekend prior to the homicide, but these facts were uncontested at trial and proven independently by other photos of the vehicle and by Boggess's testimony.

> The competition is in your mind. You created it. I wish you cared about my interests.

(State's Exh. 10.) The pictures were consequently cumulative evidence on only one of several possible motives. The photographs themselves are appended hereto, and are not inherently inflammatory.

The traditional "harmless beyond a reasonable doubt" standard is applied to determine whether errors in the application of the Fourth Amendment exclusionary rule require reversal. Chambers v. Maroney, 399 U.S. 43, 53 (1970). A major factor in determining that erroneously admitted evidence is harmless is its cumulative nature, particularly where, as where, defendant's own words confirm the truth of the fact in issue. Thus, in Harrington v. California, 395 U.S. 250 (1969), the erroneously admitted confessions of two codefendants was deemed harmless when the principal fact which they were intended to prove (defendant's presence at the scene of the crime) was independently proven by other evidence, including the live testimony of a third codefendant and defendant's own pretrial statements. Id. at 253-254. That is likewise the case here.

The jury was instructed that "you must not permit yourself to be influenced by sympathy, passion, prejudice or public sentiment for or against this defendant," and that "this defendant is not trial for any act or conduct or crimes not charged in the indictment." (R. 511-521.) The record contains nothing to suggest that the jury wavered from these instructions, as their verdict was compelled by the obviously staged crime, Flippo's self-inflicted injuries, his false reports that his Cadillac and cell

phone were missing, and the absence of any evidence to support Flippo's assertions of an intruder.

III.

CONCLUSION

Wherefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By Counsel,

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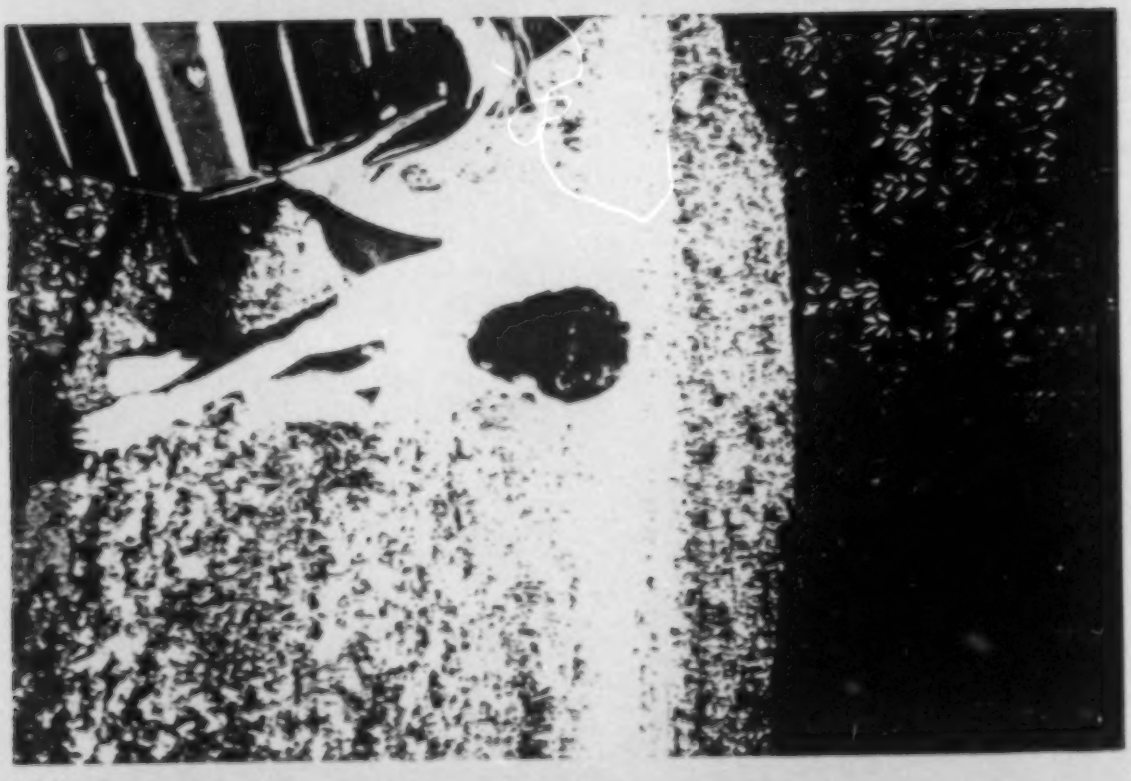

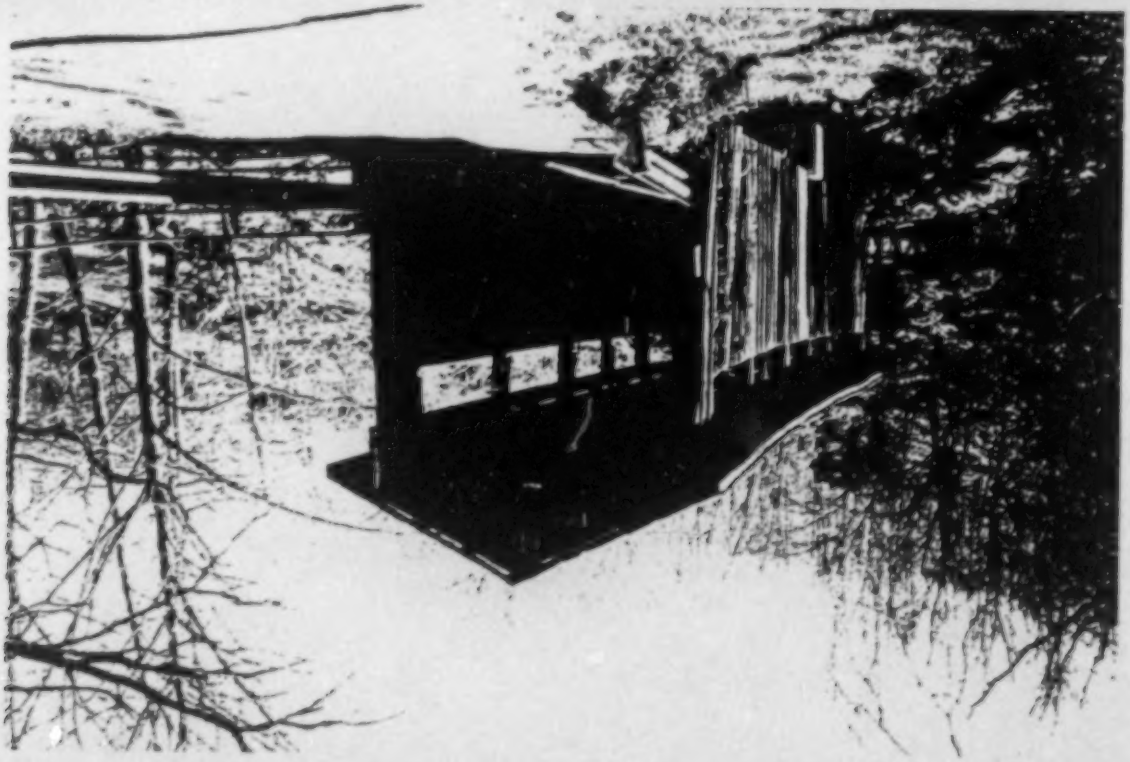

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IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No. 98-8770

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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July 26, 1999

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ARGUMENT

POINT ONE: THE ARGUMENT RAISED IN RESPONDENT'S BRIEF HAS ALREADY BEEN EXPLICITLY REJECTED BY THIS COURT IN THOMPSON v. LOUISIANA. THE PETITION FOR CERTIORARI SHOULD THEREFORE BE GRANTED.

The entire focus of this case in state court was on whether the courts below would obey Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), and suppress photographs seized without a warrant from a closed briefcase inside petitioner's cabin. The state court, after being made aware of Mincey by counsel for both sides, refused to follow United States Supreme Court precedent. Instead, it announced a rule that the police can search "anything and everything" at a crime scene without a warrant. This rule was explicitly deemed unconstitutional in Mincey.

Petitioner cited Mincey to the trial court as authority for suppression. Respondent cited Mincey in its argument against suppression. The sole ground stated by the court in its written order denying suppression was that "the investigating officers, having secured, for investigative purposes, the crime scene, were within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area." Order of May 28, 1997 at 3; Petitioner's Appendix at 3. It is difficult to imagine a more blatant announcement of a court's intention to flout the holding of Mincey.

Respondent's brief has virtually conceded the following essential points:

- The trial court's ruling, if taken at face value and given the plain meaning of its words, contradicts Mincey v. Arizona. Respondent's Brief at 13.[1]
- The exceptions to the warrant requirement for plain view, exigent circumstances and inventory searches do not apply to this case "in light of the testimony at the suppression hearing." Id at note 5.
- The police never asked petitioner for consent to search his cabin; petitioner never told the police they could make the search; the State never raised the issue of consent in the state courts; and the trial judge never mentioned consent in his order.

Nonetheless, the State argues that certiorari should be denied because a speculative theory of implied consent -- a theory that was not previously raised by either party, was not considered or mentioned by the court below, and has no foundation in either federal or West Virginia law -- might provide an alternative ground for the lower court's ruling.

This argument, which forms almost the entire basis for respondent's brief, has already been explicitly rejected by this Court -- both as a matter of law, and on facts virtually identical to those of the case at bar.

In Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), the defendant shot her husband, took an overdose of pills, and then changed her mind about suicide and called her daughter for help. The daughter called the police, admitted them to the house, and

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[1]Respondent characterized the trial court's opinion as "either an unreasoned conclusory statement or an incomplete disclosure of the trial court's reasoning." Respondent's Brief at 13. There is however, nothing in the record to suggest that the trial court's reasoning was anything other than what it explicitly said.

took them to the room containing the defendant and the deceased. The officers secured the crime scene and took the defendant to the hospital. Thirty five minutes later, other officers arrived at the house. Without obtaining a warrant, these officers searched the entire house, finding evidence inside a chest of drawers, an envelope and a wastebasket. The officers admitted at the suppression hearing that no one had given consent to the search.

The Louisiana Supreme Court upheld the search. It ruled that because the defendant asked her daughter to bring the police , she had a diminished interest in the privacy of her home that took this crime scene search out of the purview of Mincey. The Louisiana court made no attempt to validate the search as consensual.

The prosecution in Thompson argued that the United States Supreme Court should deny certiorari and affirm the conviction for two reasons: that the Louisiana courts were correct in holding that the search did not violate Mincey; and that because the victim was the one who caused the crime to be reported and the police to come to her home, the search could be upheld on a theory of implied consent -- even though that theory played no role in the state court's decision..

This Court reversed, specifically rejecting both of the respondent's claims. This Court held that the search was a direct violation of Mincey, and that Louisiana's "diminished expectation of privacy" argument "closely resembles an argument we rejected in Mincey." 469 U.S. at 22, note 4; citing 437 U.S. at 391-392.

Respondent now claims that the result of Thompson was that this Court "remanded for *inter alia*, a consideration of consent." Respondent's Brief at 17. This is simply incorrect. The ruling in Thompson was that "the petition for a writ of certiorari is granted, the judgment of the

Louisiana Supreme Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." 469 U.S. at 23. In short, this Court did exactly what it always does when overturning a state court denial of a motion to suppress -- it granted certiorari, reversed the conviction, remanded the case to the state courts, and directed the state courts to act in accordance with the opinion. The prosecution is certainly free, if it can do so under state rules of procedure, to ask the state courts on remand to belatedly consider consent. This Court, however, certainly did not order the state courts to do so.

Respondent now asserts that because this Court mentioned the State's last-minute claim of consent in Thompson, it somehow either implied approval of that theory, or directed that consent be reviewed by a state court. This too, is simply an incorrect reading of Thompson.

If anything, this Court strongly suggested that respondent's new claim was not a valid means of avoiding Mincey. Noting that "the issue of consent is ordinarily a factual issue unsuitable for our consideration in the first instance," the Court still stated that, "[p]etitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary." 469 U.S. at 22, 23. If petitioner's call to the police for help did not diminish her expectation of privacy sufficiently to distinguish her case from Mincey, it is difficult to see how draping that call for help in the language of "implied consent" changes the Fourth Amendment analysis in any way.

Thompson is so similar to Mr. Flippo's case -- both factually and legally -- as to be indistinguishable.

In both cases, the petitioner either reported a crime to the police or asked someone to report it for them. In both cases, the petitioner caused the police to come to the crime scene. In

both cases, the police took the petitioner to the hospital, secured the crime scene, and some time later[2] -- without obtaining a warrant -- did a general search for evidence that included opening closed containers. In both cases, the issue of consent was neither raised by the prosecution nor addressed by the courts. In both cases, state courts upheld the search on grounds that had been explicitly rejected by the United States Supreme Court in Mincey.

The remarkable resemblance between Thompson and Flippo has continued at the United States Supreme Court level. In both cases, the State opposed certiorari and reversal, claiming that Mincey was not really violated, and that the belatedly conceived theory of implied consent was enough to avoid review.

In Thompson, this Court granted certiorari and reversed the conviction. The same result should be reached in Mr. Flippo's case.

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[2]Respondent correctly notes that the record does not state at exactly what time the police opened the briefcase. Respondent's Brief at 20, note 12. It is agreed, however, that about three hours after the officers arrived, and before they began the search, they took photographs of the inside of the cabin, including the briefcase, which was still closed. The search was therefore at least three hours after the police secured the crime scene, and may have been as much as fifteen hours later. In Thompson, the search began thirty five minutes after the scene was secured, so there can be no claim that insufficient time had passed in Mr. Flippo's case for Mincey to come into play.

POINT TWO: THE ILLEGALLY SEIZED PHOTOGRAPHS WERE USED BY THE STATE TO MAKE REPEATED AND GROSSLY IMPROPER SUGGESTIONS TO THE JURY THAT PETITIONER IS HOMOSEXUAL. PETITIONER'S RESPONSE DOES NOT EVEN ADDRESS THIS PREJUDICE. THE TRIAL COURT'S ERROR WAS THEREFORE NOT HARMLESS.

Respondent candidly admits that the prosecution case "was a circumstantial case built largely upon inconsistencies between Reverend Flippo's statements and the physical evidence." Respondent's Brief at 7. There were no eyewitnesses to the crime, no confession and no scientific evidence, such as DNA, tying Mr. Flippo to the homicide.

It was therefore horribly prejudicial when the State used the illegally seized photographs of a partially-nude man, Joel Boggess, to repeatedly suggest to the jury that Mr. Flippo is homosexual. The State coupled the introduction of the photos with equally prejudicial testimony that Mr. Flippo and Mr. Boggess had once gone on a ski trip, during which they shared a motel room that had only one bed. The relevance of this testimony has also never been established.

It is significant that the State never claimed that petitioner's alleged sexual orientation was a motive for the crime. Indeed the trial prosecutor, albeit disingenuously, even tried to claim that he was not suggesting anything about homosexuality at all -- he was merely letting the jury know "that the relationship of these two men was more than just good friends." T. 1581.[3]

A brief review of the State's closing argument reveals just how damaging the innuendo about homosexuality was:

> I didn't accuse Joel Boggess of being a homosexual. I didn't accuse him of being gay. I didn't accuse Mr. Flippo of being gay or homosexual. I never

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[3]Pages in the trial transcript will be noted as T.#.

did that. . . .

But I submit to you that most people in our society would think it's unusual . . . for a minister or pastor of a church to sleep with people in his church that he's not married to. . . .

Pastor Flippo is spending nights sleeping with Joel Boggess, am I wrong to think that's improper? . . .

I don't know what happened in that bed. . . .

And I don't know exactly what the extent of the relationship was between Mr. Flippo and Mr. Boggess, but it appeared to be very close, very intimate.

T. 1880-1882.

The illegally seized photos provided a graphic visual representation of the State's extraordinarily improper closing argument. Respondent's brief does not even address the prejudice caused by this sexual innuendo. Given the number and seriousness of these suggestions, the error cannot be deemed harmless.

Finally, respondent suggests that certiorari be denied because there is a theoretical possibility that petitioner might be permitted to re-raise the exact same issue in a state habeas corpus petition. However, as respondent acknowledges, West Virginia Code §53-A-1(b) precludes the relitigation of claims which "have been previously and finally adjudicated." Mr. Flippo's case falls squarely within this prohibition. Moreover, the chance is virtually nil that the same trial court that already heard the case and ruled on the issue would now decide that it was "clearly wrong," and invite state habeas review.

Although respondent has repeatedly asserted that "West Virginia is not a renegade State that chooses to ignore Mincey," Respondent's Brief at 11, the fact of the matter is that the trial

court announced a rule which does exactly that. Mr. Flippo, who is serving a sentence of life without possibility of parole, has been afforded no meaningful review of that decision, because the West Virginia Supreme Court of Appeals refused to permit any appeal of the trial court's ruling. Certiorari should therefore be granted, and the conviction reversed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

JAMES MICHAEL FLIPPO *v.* WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 98–8770. Decided October 18, 1999

PER CURIAM.

Petitioner's motion to suppress evidence seized in a warrantless search of a "homicide crime scene" was denied on the ground that the police were entitled to make a thorough search of any crime scene and the objects found there. Because the rule applied directly conflicts with *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we reverse.

One night in 1996, petitioner and his wife were vacationing at a cabin in a state park. After petitioner called 911 to report that they had been attacked, the police arrived to find petitioner waiting outside the cabin, with injuries to his head and legs. After questioning him, an officer entered the building and found the body of petitioner's wife, with fatal head wounds. The officers closed off the area, took petitioner to the hospital, and searched the exterior and environs of the cabin for footprints or signs of forced entry. When a police photographer arrived at about 5:30 a.m., the officers reentered the building and proceeded to "process the crime scene." Brief in Opposition 5. For over 16 hours, they took photographs, collected evidence, and searched through the contents of the cabin. According to the trial court, "[a]t the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives." Indictment No. 96–F–119 (Cir. Ct. Kanawha County, W. Va., May 28, 1997), App. A to Pet. for Cert., p. 2.

Petitioner was indicted for the murder of his wife and

moved to suppress the photographs and negatives discovered in an envelope in the closed briefcase during the search.[1] He argued that the police had obtained no warrant, and that no exception to the warrant requirement justified the search and seizure.

In briefs to the trial court, petitioner contended that *Mincey* v. *Arizona*, *supra*, rejects a "crime scene exception" to the warrant requirement of the Fourth Amendment. The State also cited *Mincey;* it argued that the police may conduct an immediate investigation of a crime scene to preserve evidence from intentional or accidental destruction, *id.*, at 394, and characterized the police activity in this case as "crime scene search and inventory." Brief in Opposition 12. The State also relied on the "plain view" exception, *id.*, at 393 (citing *Michigan* v. *Tyler*, 436 U. S. 499, 509–510 (1978)), noting only, however, that the briefcase was unlocked.

In denying the motion, the trial court said nothing about inventory or plain view, but instead approved the search as one of a "homicide crime scene":

> "The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of [the] briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could law-

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[1] The photographs included several taken of a man who appears to be taking off his jeans. He was later identified as Joel Boggess, a friend of petitioner and a member of the congregation of which petitioner was the minister. At trial, the prosecution introduced the photographs as evidence of petitioner's relationship with Mr. Boggess and argued that the victim's displeasure with this relationship was one of the reasons that petitioner may have been motivated to kill her.

fully examine." App. A to Pet. for Cert., at 3.

After hearing an oral presentation of petitioner's petition for appeal of this ruling, and with the full record before it, the Supreme Court of Appeals of West Virginia denied discretionary review. No. 982196 (W. Va., Jan. 13, 1999). App. B to Pet. for Cert.

A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement, *Katz* v. *United States*, 389 U. S. 347, 357 (1967), none of which the trial court invoked here.[2] It simply found that after the homicide crime scene was secured for investigation, a search of "anything and everything found within the crime scene area" was "within the law." App. A to Pet. for Cert., at 3.

This position squarely conflicts with *Mincey* v. *Arizona*, *supra*, where we rejected the contention that there is a "murder scene exception" to the Warrant Clause of the Fourth Amendment. We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, *id.*, at

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[2]The State suggests that the trial court's finding that the search was "within the law" could be read as premised on the theories of plain view, exigent circumstances, and inventory that the State advanced below. No trace of this reasoning appears in the trial court's opinion, which instead appears to undermine the State's interpretation. It seems implausible that the court found that there was a risk of intentional or accidental destruction of evidence at a "secured" crime scene or that the authorities were performing a mere inventory search when the premises had been secured for "investigative purposes" and the officers opened the briefcase "in the ordinary course of investigating a homicide." Nor does the court's validation of "investiga[ting] and examin[ing] . . . anything and everything found within the crime scene area," including photographs inside a closed briefcase, apparently rest on the plain view exception. App. A to Pet. for Cert., at 2, 3.

392, but we rejected any general "murder scene exception" as "inconsistent with the Fourth and Fourteenth Amendments— . . . the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." *Id.*, at 395; see also *Thompson* v. *Louisiana*, 469 U. S. 17, 21 (1984) (*per curiam*). *Mincey* controls here.

Although the trial court made no attempt to distinguish *Mincey*, the State contends that the trial court's ruling is supportable on the theory that petitioner's direction of the police to the scene of the attack implied consent to search as they did. As in *Thompson* v. *Louisiana*, *supra*, at 23, however, we express no opinion on whether the search here might be justified as consensual, as "the issue of consent is ordinarily a factual one unsuitable for our consideration in the first instance." Nor, of course, do we take any position on the applicability of any other exception to the warrant rule, or the harmlessness vel non of any error in receiving this evidence. Any such matters, properly raised, may be resolved on remand. 469 U. S., at 21; see also *United States* v. *Matlock*, 415 U. S. 164 (1974).

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment of the West Virginia Supreme Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.